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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

NO. 80-96

IN THE

Supreme Court of the United States

SAVOY FAUCET COMPANY, INC., d/b/a
SAVOY BRASS MANUFACTURING COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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June 30, 1980

THE QUESTIONS PRESENTED

1. Is it unlawful under the Labor Act for an employer to refuse to consider job applications of members of a minority union that have been tendered to him by such a union; can such a refusal be viewed under the Act as unlawfully discriminatory?

2. Does the Labor Act, as applied to this case, require an employer to recognize a minority union, and to deal with such a union, for this limited purpose?

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IN THE
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SAVOY FAUCET COMPANY, INC., d/b/a/
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Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

The Petitioner, Savoy Faucet Company, Inc. ("Employer"), prays that a writ of certiorari issue to review the order of enforcement of the United States Court of Appeals, Second Circuit, made on April 21, 1980.

OPINIONS AND DECISIONS BELOW

The Court of Appeals disposed of this case with a summary order, as yet unreported, and which appears at Appendix A, *infra*, page 8 ; the Court issued no opinion. The decision and order of the National Labor Relations Board is reported at 241 NLRB No. 7, and appears at Appendix B, *infra*, pages 10-36

JURISDICTION

The order of the Court of Appeals was entered on April 21, 1980. See Appendix A, page 8, *infra*. This petition for certiorari was filed less than 90 days from that date. Jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(a)(3) of the Labor Management Relations Act (29 U.S.C. §158 [a] [3]) in part provides:

"§ 158. Unfair Labor Practices
"(a) It shall be an unfair labor practice for an employer —

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership if any labor organization***."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and are consistent with the findings of the National Labor Relations Board and its Administrative Law Judge.

In July, 1977 the Phelps-Dodge Corporation terminated the operations of one of its divisions, Savoy Manufacturing Company, a Long Island City, N.Y., manufacturer of plumbing fixtures. (16)* At the peak of its operations, Phelps-Dodge

*References are to Appendix B to the Petition, the NLRB's decision and order, *infra*.

employed about 175 workers there; 80 at the time of plant closing and liquidation. Phelps-Dodge sold its machinery and inventory at the Long Island City location to plant liquidators who, in turn, sold part of the machinery and inventory to purchasers in the South and part to Clinton and Ronald Goerler, who are brothers and the principals of what was to become the newly formed Savoy Faucet Co., Inc. Sometime in mid-October, 1977 the Goerlers with a few workers began to manufacture a limited variety of plumbing fixtures at the same location under the trade name of Savoy Brass Manufacturing Company. (17)

Phelps-Dodge's production and maintenance workers at this facility had been represented by Local 28-A, International Brotherhood of Painters and Allied Trades, AFL-CIO, the charging party in this case. On October 16, 1977 this union made a demand for recognition upon this Employer (17) and on October 31 began picketing for recognition; the Employer filed both an unfair labor practice charge and a petition for a representation election. (18) An expedited election was held on December 2. (*Id.*) At the time of the election the Employer employed 23 production and maintenance workers (20), about one-third of whom were former employees of Phelps-Dodge. (*Id.*) Twenty-two votes against the union were counted in that Board election, and 1 for the union, and the Board certified the result of the election accordingly. (18.)

The union ceased picketing the Employer immediately following balloting on December 2, when the union's business representative led 23 pickets into the Employer's plant. The union business agent had obtained the signature of each of these pickets on separate forms that read: "I worked for Savoy Brass for _____ years as a _____. I would like to work for Savoy immediately and I am available for work."(18)

The union official thrust these forms upon Employer representatives who were present. (*Id.*)

A charge was filed by the union several weeks later, on January 9, 1978, in which the union essentially alleged that the Employer's failure to hire union pickets was an unfair labor practice. (15, 19) The Board's complaint and hearing followed.

The Board found that the Employer's work force had expanded at the time of the hearing in July, 1978 to the point that it had grown to about 60 workers. (18) The Board also found that about 21 of the 60 workers employed at the time of the hearing had previously worked for Phelps-Dodge and, as the Board presumed that all the former Phelps-Dodge workers had had some kind of union affiliation, the Board found this number to be:

> "a solid indication that past union affiliations were not a factor in Savoy Faucet's hiring determinations ... This figure also denotes more than mere tokenism by the Respondent in the hiring of union members." (23)

The Board, nevertheless, found that two of the union's pickets had been hired between the time the charge was filed on January 9 and July, 1978, when the hearing was held, but that their hirings had been unlawfully delayed: that is, because the Employer could give no acceptable business justification for declining to hire them when presented with their applications. (27) Additionally, the Board found that another picket had been offered a job by the Employer but that she was unable to accept it for personal reasons. But this offer, too, the Board found was unlawfully delayed, and for similar reasons. (28)

Similarly, another picket should have been offered employment but was not, the Board found. (30)

The pickets found to have been unlawfully discriminated against previously had been employees of Phelps-Dodge, when they had been represented by the charging party, Local 28-A. The Board has fashioned a remedy in this case that includes a liability for backpay to the individuals found to be discriminatees that accrues from December 2, 1977, when the minority union, their representative*, presented their job applications to the Employer. (32)

The Board's holding in this case was made without a finding of any other unlawful employer activity or finding of employer anti-union *animus*.

REASONS FOR GRANTING WRIT

1. Conflict With Other Decisions

(a) Consideration by this Court is necessary on the independent ground that the holding of the National Labor Relations Board, enforced by the Circuit Court, conflicts squarely with *Howard Johnson Co., Inc. v. Detroit Local*, 417 U.S. 249 (1974). In that case, the owner and operator of a restaurant and motel under franchise agreements with the Howard Johnson chain sold the two units to the Howard Johnson Company in what the Court found to be an arm's-length transaction. A union that represented the workers employed by the former owner of the restaurant and the motel sought arbitration with the Howard Johnson Company because the Company declined to hire the workers terminated by the former

*The Board's Complaint in this case in part alleges:
"9. Since on or about December 2, 1977, the individuals named ... through their representative, the Union [Local 28-A]... made applications to Respondent for employment..."

owner and because the Company began to hire its own work force. The union hoped, through arbitration, to require the successor to employ union members. In *Howard Johnson*, this Court formulated what is a major statement of federal labor law policy when it held that as the Howard Johnson Company had only purchased the assets of the predecessor employer, a predecessor employer who had terminated the employment of his workers, the Howard Johnson Company had no obligation to recognize the union for any purpose or to arbitrate the union's claims. The Court in *Howard Johnson* also affirmed the right of the new owner to operate the business with his own labor force.

In this case, the Board (and the Circuit Court) have held that the union representing the predecessor's workers had standing to make a concerted application for the employment of the predecessor's work force, and that this Employer was obliged to respond to the union. As far as we have been able to determine, this holding, that a minority union need be recognized, although for a limited purpose, is novel in American labor law.

(b) The holding of the National Labor Relations Board in this case is consistent with its decision in *Macomb Block & Supply, Inc.*, 223 NLRB 1285 (1976). In *Macomb*, the Board reversed an Administrative Law Judge's reading of *Howard Johnson* and held that a successor employer who purchased the assets of a predecessor and who sought to hire his own workers violated the Act when the employer refused the request made by a union to hire its members, the predecessors employees.* The Sixth Circuit denied enforcement, *NLRB v. Macomb Block & Suply*, 570 F. 2d 1304 (1978), with a short order in which it concluded in part that:

> "...The Board failed to apply the controlling law as set forth in *Howard Johnson Co., Inc. v. Detroit Local,*

See the Board's Conclusions of Law, par. 3, at 223 NLRB 1286.

etc., Union, 417 U.S. 249 (1974) to the facts of this case."

2. Impact on Business Community

The impact of the holding below on the business community is apparent and, with the conflict arising from the holding of the Sixth Circuit in *Macomb, supra,* will have a confusing and inhibiting affect upon the transfer of business property between parties, in those situations where there is a former presence of a union, until this Court resolves such conflict.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the United States Circuit Court of Appeals, Second Circuit.

Respectfully submitted,

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June 30, 1980

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of April, one thousand nine hundred and eighty.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges
HONORABLE CHARLES S. HAIGHT, JR.
District Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—against—

No. 80-4007

SAVOY FAUCET, INC., d/b/a/ SAVOY BRASS MANUFACTURING COMPANY,

Respondent.

N.B. Since this statement does not consitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

This cause came on to be heard on the application of the National Labor Relations Board for enforcement of its Decision and Order, dated March 15, 1979 and was briefed and argued by counsel.

ON CONSIDERATION THEREOF, it is now hereby ordered, adjudged, and decreed that the order of the Board be and it hereby is enforced for the reasons given in its aforesaid Decision and Order, reported at 241 NLRB No. 7.

WILFRED FEINBERG

ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges

CHARLES S. HAIGHT, JR.

District Judge

"EXHIBIT B"

241 NLRB No. 7 PMT D-4801 Long Island City, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAVOY FAUCET CO., INC. d/b/a
SAVOY BRASS MANUFACTURING COMPANY
and Case 29-CA-6156
METAL PRODUCTION AND NOVELTY
WORKERS UNION, LOCAL 28-A,
INTERNATIONAL BROTHERHOOD OF
PAINTERS AND ALLIED TRADES, AFL-CIO

DECISION AND ORDER

On October 13, 1978, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Admini-

[1]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrent. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge's finding that the remarks allegedly made by Eugene Charon concerning Respondent's hiring policies are not attributable to Respondent In this regard, the Administrative Law Judge relied solely on his finding that Charon is a nonsupervisory employee. We agree that Charon is not a statutory supervisor. The Board has long held, however that a conclusion that an individual is not a supervisor is not dispositive of the question of whether that individual is acting as an agent of an employer. See, e.g. *Helena Laboratories Corporation*, 225 NLRB 257, 258 (1976); *Samuel Liefer and Harry Ostreicher, a Copartnership d/b/a River Manor Health*

strative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found that Respondent was motivated by union considerations in refusing to hire Gerardo Pinzon, and thereby violated Section 8(a)(3) and (1) of the Act. We disagree.

Joseph Lentini, Respondent's manufacturing superintendent, testified that Pinzon was not hired by Respondent because the position he had previously held had been eliminated and there was no opening for him. Further, Lentini, based on his prior experience in working with Pinzon, stated that there were some jobs Pinzon could not perform due to his tendency to develop hives in response to various conditions in the plant, such as dust and oil. He added that the hives caused Pinzon to lose working

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Related Facility, 224 NLRB 227, 230-231 (1976); and *Clevenger Logging, Inc.*, 220 NLRB 768, 778 (1975). Nevertheless, we find that the record is insufficient to establish that Charon is acting as an agent of Respondent. Moreover, the General Counsel's offer of proof with respect to Charon's duties for his previous employer, Phelps-Dodge, even if true, is not material to Charon's agency status with Respondent.

[2]The Administrative Law Judge concluded that Respondent violated Sec. 8(a)(3) and (1) of the Act by its delay in offering employment to Carmen Garcia, John Luscavage, and Olga Vega. Respondent excepts to his finding on the grounds, *inter alia*, that the complaint alleged unlawful refusals to hire, but did not specifically allege unlawful delays in hiring. Although the complaint did not specifically allege these violations found by the Administrative Law Judge, the issues were fully litigated at the hearing and the record fully supports his conclusions. Furthermore, the violations found with regard to these individuals are closely related to the violations alleged in the complaint. Accordingly, we adopt the Administrative Law Judge's finding of these violations. See *Gerald G. Gogin d/b/a Gogin Trucking*, 229 NLRB 529 (1977).

Further, in agreeing with the Administrative Law Judge's finding that Respondent unlawfully discriminated against Garcia, J. Luscavage, and Vega, we specifically note that Respondent's manufacturing superintendent Lentini, acknowledged that Luscavage and Vega, as well as Garcia, were good employees. Thus, Lentini testified, *inter alia*, that Luscavage was "like clock work" and "you don't have to worry about him." Similarly, with regard to Vega, Lentini testified, "A good worker, very diligent. Her attendance was good. ..." As the Administrative Law Judge concluded with respect to Garcia, these sentiments, coupled with Respondent's asserted desire to hire only the "cream of the crop," are inconsistent with Respondent's delay in making offers of employment to these individuals.

time. The Administrative Law Judge found that Respondent's asserted reasons for not hiring Pinzon were factually supported by the record.

It appears, from Pinzon's own testimony that his disability was not, in fact, job-related. Nevertheless, Pinzon himself admitted that during his tenure with his previous employer he was absent from work once or twice a month due to his hives. In light of this admission, and the fact that Respondent was under the reasonable assumption that there were no jobs in which it could place Pinzon without adversely affecting his physical condition, we cannot find that Respondent's asserted reasons for not hiring Pinzon were factually unsupported. We therefore conclude that the evidence is insufficient to establish that Respondent's failure to hire Pinzon violated Section 8(a)(3) and (1), and we shall modify the recommended Order accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Savoy Faucet Company, Inc. d/b/a Savoy Brass Manufacturing Company, Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 2(a) and 2(b):

"(a) Offer employment to Blanca Amaya.

"(b) Make whole Blanca Amaya, John Luscavage, Carmen Garcia, and Olga Vega for any loss of pay suffered by them by reason of the discrimination practiced against them, in the manner described above in the section entitled 'Remedy.' "

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. March 15, 1979

(SEAL)

John A. Penello, Member
Betty Southard Murphy, Member
John C. Truesdale, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing in which all parties had an opportunity to present evidence, the National Labor Relations Bo. rd has found that we committed certain unfair labor practices and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT refuse to employ job applicants.

WE WILL NOT delay making offers of employment to job applicants because they have engaged in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer a job to Blanca Amaya, and WE WILL make her and John Luscavage, Carmen Garcia, and Olga Vega whole for any loss of pay they have suffered by reason of the discrimination practiced against them, with interest.

All of our employees are free to become or to remain members of Metal Production and Novelty Workers Union, Local 28-A, International Brotherhood of Painters and Allied Trades, AFL-CIO, or any other labor organization.

SAVOY FAUCET COMPANY, INC.
d/b/a/ SAVOY BRASS
MANUFACTURING COMPANY

_____
(Employer)

Dated_____

By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directred to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone (212) 330-7709.

JD-716-78
Long Island City, New York

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SAVOY FAUCET COMPANY, INC., d/b/a
SAVOY BRASS MANUFACTURING COMPANY

and Case No. 29-CA-6156

METAL PRODUCTION AND NOVELTY
WORKERS UNION, LOCAL 28-A,
INTERNATIONAL BROTHERHOOD OF
PAINTERS AND ALLIED TRADES,
AFL-CIO[1]

Stephen Appell, Esq., of
Brooklyn, New York, for
the General Counsel.
Roger Madon, Esq., of New York,
New York, for the Charging Party.
Henry C. Woicik, Esq., of
Jericho, New York, for the
Respondent.

DECISION

I. Findings of Fact

A. Statement of the Case

WALTER H. MALONEY, JR., Administrative Law Judge. This case came on for hearing before the undersigned in Brooklyn, New York, upon an unfair labor practice complaint,[2]

[1]This portion of the caption was amended at the hearing.

[2]The principal docket entries in this case are as follows:
Charge filed herein by Metal Production and Novelty Workers Union, Local 28-A, International Brotherhood of Painters and Allied Trades, AFL-CIO (herein called Union) on January 9, 1978; Complaint issued by Director, Region 29, on March 7, 1978; Respondent's Answer filed April 4, 1978; Hearing held in Brooklyn, New York, on July 17 and 18, 1978.

issued by the Director of the Board's Twenty-Ninth Region, which alleges that the Respondent Savoy Faucet Company, Inc.,[3] now doing business as Savoy Brass Manufacturing Company, violated Section 8(a)(1) and (3) of the Act. More particularly, the Complaint alleges that the Respondent refused to hire eleven named persons who had formerly worked for the Phelps-Dodge Corporation at the same location in the same kind of manufacturing operation, because said individuals had picketed the Respondent's plant in an effort to obtain employment. The Respondent has hired two of the eleven pickets, asserts that it unsuccessfully offered employment to one other, and refused to hire the rest for a variety of non-discriminatory reasons. Upon the contentions the issues herein were joined.

B. The Unfair Labor Practices Alleged

For more than thirty years an assortment of plumbing fixtures has been manufactured by a succession of employers at a plant located on Thirty-Fifth Street in Long Island City. The business was originated by the Savoy Brass Manufacturing Company, a company owned and operated by Max and Richard Kadish. The Kadishes still own the building. About 1971 or 1972, they sold the manufacturing business to the Phelps-Dodge Corporation, which continued to operate it until July 22, 1977. At one time Phelps-Dodge, doing business as Savoy Brass, occupied three buildings and employed about 175 people, but, for reasons described in the record by the Respondent's present plant manager, Joseph Lentini, Phelps-Dodge's plumbing fixture business declined precipitously to the point where it decided to close the plant, terminate this aspect of its overall operations, and layoff all of the employees who were still employed at this location. About 80 people were terminated at the time of the plant closing, including a number of salaried employees.

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[3]Respondent admits, and I find, that it is a New York corporation which maintains its principal place of business in Long Island City, New York, where it is engaged in the manufacture, sale, and distribution of faucets, plumbing fixtures, and related products. Since September 1, 1977, Respondent has sold and delivered from its New York plant directly to points and places located outside the State of New York goods and materials valued in excess of $50,000. Accordingly, it is an employer engaged in commerce within the meaning of Section 2(2), 2(6) and 2(7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

Phelps-Dodge sold its machinery and inventory at the Long Island City location to David Weisz and the Fairfield Equipment Company, who acted as liquidators. The liquidators sold some of the equipment and inventory to purchasers in the South. On or about October 1, it sold the remainder to Clinton and Ronald Goerler, the principals of Savoy Faucet Co., Inc. Shortly thereafter, they began to manufacture a limited variety of plumbing fixtures at the same location under the trade name Savoy Brass Manufacturing Company. The General Counsel does not contend that the Respondent, sometimes called herein Savoy Faucet, is a successor in the legal sense to the Phelps-Dodge Corporation.

The Goerler brothers have a number of other business interests which require their attention. Ronald Goerler devotes only a very small portion of his time to Savoy Faucet, while Clinton Goerler spends about half of each working day at the premises. The current manufacturing operation is substantially under the control of Lentini, who has worked successively for Savoy Brass, Phelps-Dodge, and now Savoy Faucet. Though Lentini is now the plant manager, his position with the former manufacturer was non-supervisory. About six or seven former Phelps-Dodge foremen and managerial employees, including plant engineer Joe Ferrigno, assist Lentini in the Savoy Faucet operation. At present, Lentini handles personnel, programs production, advises on purchasing, and lays out the tooling. Ferrigno takes charge of the actual production. Lentini had no connection with personnel matters when the plant operated under the Phelps-Dodge ownership. He remained on the Phelps-Dodge payroll until January 1, 1978, to assist in the liquidation effort, but in fact assumed certain responsibilities for the Goerlers during that interim period.

Phelps-Dodge had a contract with the Union covering all of its Savoy Brass production and maintenance employees. The contract had a conventional union shop provision, so all or almost all of the non-supervisory employees who were terminated at the plant closing in July were Union members. On October 31, 1977, the Union began to picket the premises of Savoy Faucet with signs stating that Crestgood (one of the Goerler enterprises) was unfair. All of the eleven former Phelps-Dodge employees named in the Complaint (and possibly others

as well) participated in the picketing effort. Several of them testified in this proceeding that they were picketing to "get their jobs back." The Union apparently made a demand upon the Goerlers for recognition, whereupon Savoy Faucet filed both an 8(b)(7)(C) charge against the Union and a representation petition (Case No. 29-RM-547). An expedited election was held at the plant on December 2. The Union challenged the votes of 23 Savoy Faucet employees whose names appeared on the *Excelsior* list on the basis that they had been illegally hired to replace former Phelps-Dodge employees. The Regional Director overruled these challenges. One vote was cast in favor of the Union and 22 were cast against it. Some twenty-three former Phelps-Dodge employees, including the eleven discriminatees, presented themselves at the polling place and attempted to vote. Their votes were challenged by both the Board Agent and the Company because they were not employees and their names were not on the voting list. These challenges were sustained and a certification of results was issued.

On the date of the election, the twenty-three former Phelps-Dodge employees whose votes had been challenged went to the Savoy Faucet office after the election together with Saul Lasher, the Union's business representative. They spoke with one of the Goerlers and with Lentini, who was not then a Savoy Faucet employee. The Respondent's attorney was also present. Lasher had obtained the signatures of each of these employees on separate forms which read: "I worked for Savoy Brass for _____ years as a _____ I would like to work for Savoy immediately and I am available for work." These forms were presented to the Company officials who were present. Clinton Goerler told them that the Company had no openings at the present time but would call them when jobs became available. At that time the Respondent had slightly in excess of twenty employees. At the time of the hearing in July, 1978, it had grown to about 60 employees. The increase in the work force was occasioned by the rapid expansion of the Respondent's business in a relatively short period of time.

During the late fall of 1977, when the Goerlers were starting up the Savoy Faucet operation, a number of conversations on the subject of unionization occurred involving either a Goerler or one of their supervisors. On one occasion before the December 2

election, Lasher visited the plant to claim that the Painters "had jurisdiction" over the shop. Ferrigno's reply to him was that, if the new Company were going to have a union, he would prefer an independent union to the Painters. Lentini testified that he never heard the Goerlers express any opinion on the subject of unionization but speculated at the hearing that they would prefer an independent union to the Painters. In this particular Ferrigno contradicted Lentini's testimony, stating that on one occasion in his presence and in Lentini's presence, Ron Goerler stated that they would prefer to operate the factory as a non-union shop. However, Goerler did not say they preferred to hire only non-union job applicants.

A number of statements were attributed to Eugene Charon, an employee of Savoy Faucet, who was at various times a foreman for Phelps-Dodge. As hereinafter discussed, I am of the opinion that Charon was never anything more than a leadman for Savoy Faucet so his remarks and the questions he put to individual employees amount to nothing more than an expression of his own opinions and his own curiosity. On one occasion, Supervisor Joseph Zarzycki ("Joe Zarek") told pickets that they did not deserve to come back in the shop and there was no use picketing because the bosses did not want a union in the shop. Sometime before the new owners resumed production and at a point in time prior to the commencement of the picketing, Naomi Hernandez, a laid off Phelps-Dodge employee, visited the plant and asked Supervisor Anthony Samaniego for a job. Samaniego said that they had no jobs at that time and were only cleaning the machines in preparation for selling them. He also told her that the Company did not want people from the Union and that they did not want the Union. Mrs. Hernandez reported this conversation to the Union Hall. Ferrigno admits telling job applicant Earl Henry some time in October that the plant would operate as a non-union shop.

On March 20, 1978, discriminatee John Luscavage started to work for Savoy Faucet. On April 4, discriminatee Carmen Garcia also started to work, although not in a position comparable to the supervisory job she held with Phelps-Dodge. Respondent offered a job to discriminatee Olga Vega but she was unable to accept because she could not obtain the services of a

babysitter for her child. The other eight discriminatees named in the Complaint have not been offered jobs by the Respondent. Out of sixty persons in the employ of the Respondent on July 18, 1978, some twenty-one formerly worked for Phelps-Dodge. Presumably they were all Union members during their tenure with that employer. Out of a total of eighty-nine persons hired by the Respondent since it started operations in late October, 1977, some twenty-two are former Phelps-Dodge employees. These latter figures include persons now on the payroll as well as others who were hired but have been terminated.[4] Lentini and others testified that at least one of the Goerler brothers is active in a religious movement known as The Way. The Way is not a conventional church but is a religious ministry which has a definite set of religious beliefs and practices which include Bible readings and prayers at the job. Lentini testified that neither of the Goerlers has ever expressed to him a desire or requirement that members of The Way be granted preference in hiring. However, he sensed such a desire on their part in order to assist in a rehabilitation effort of a number involved in The Way Ministry, and he has followed such a practice since taking over as plant manager. A number of the employees hired from the membership of The Way are individuals who lack job skills and work experience or who have personal difficulties which stand as impediments to their employment. As a result, a number of these individuals have been hired but were terminated after short periods of employment. As of the time of the hearing, some nine permanent production employees are Way members. Another twelve members have been hired since October, 1977, but have been terminated over a period of time for reasons of unsuitability.

C. Analysis and Conclusions

1. The Supervisory Status of Eugene Charon

From time to time Eugene Charon was a supervisor for Phelps-

[4]Estimates in the record provided by Lentini which he made in summary form show slightly different figures than that found above. I feel that the figures set forth above, taken from the actual records of the Respondent, are more precise and accurate than Lentini's estimate.

Dodge. At other times, he was a union member and a member of the Phelps-Dodge bargaining unit. The Respondent now employs him as a leadman in the polishing and grinding section. He works with seven other employees and is supervised by John Gilberg. Charon is an experienced grinder. He is hourly rated and is paid more than any other employee in this section. Normally Gilberg assigns work to the employees in this section, although he may occasionally pass along an order to other employees through Charon. Any disciplinary matters involving employees in the polishing and grinding section are handled by Gilberg. Charon often instructs new employees how to operate a particular piece of equipment. As he is bi-lingual, he is sometimes used as an interpreter when Company supervisors wish to communicate with Spanish-speaking employees. Occasionally Charon has given Gilbert or others his opinion as to the skill or efficiency of an employee in his section. These duties and functions clearly establish that Charon is a non-supervisory employee. Accordingly, as indicated above, certain comments which he made to Mrs. Garcia and other employees concerning the Respondent's hiring policies are his own and may not be attributable to the Respondent.

2. The Refusal to Rehire Eight Named Discriminatees

There is no question that, between October 31 and December 2, all of the discriminatees named in the Complaint participated in a picketing effort which took place in front of the Respondent's premises. They were all former Phelps-Dodge employees, so it is incontestable that the Respondent knew of their Union affiliation and activities when it made its hiring decisions. Respondent acknowledges as much but claims that such considerations played no part in its decisions not to hire them. Lentini, who was not in a position to supervise the Phelps-Dodge operation, testified without contradiction that Phelps-Dodge ran a poor operation, turned out a poor quality of goods, and that the laxity and inefficiency of its management were what contributed to its decline and eventual fall. Part of this "loose ship," in his opinion, was the fact that Phelps-Dodge was operating with employees whom Lentini did not wish to employ now that he was in a position to run the plant in accordance with his own views. Moreover, he regarded his own bosses, the Goerlers, as strict and

straightlaced individuals who would not tolerate employee hanky-panky and he has tried to accomodate his employment practices to their views and desires as he perceived them. In trying to run a "taut ship," Lentini has made conscious judgments not to hire eight of the eleven discriminatees named in the Complaint. The nature of these judgements—whether bona fide or pretextual—is what is principally in issue in this case.

In assessing this close question of motive, it is well to state at the outset certain premises on which the assessment must proceed. Savoy Faucet is not a successor to Phelps-Dodge but is a stranger to the former employer of these individuals. It has no obligation to hire any of Phelps-Dodge's former employees. Its duty in this regard is a negative one — to refrain from refusing to hire any former Phelps-Dodge employees, all of whom are unionized, because of their former union affiliations or their current union activities. Because Savoy Faucet and Phelps-Dodge are essentially strangers to each other, certain comments in the transcript about reinstatement or "getting our old jobs back" are mere figures of speech which misdescribe the actual posture of the parties to this proceeding. The jobs in question are new jobs and all those who occupy them are new hires. In staffing a new operation, Lentini was at liberty to choose the best applicants available and to avoid Phelps-Dodge's asserted mistakes if he could. He testified that this was his avowed purpose in recruiting employees for Savoy Faucet.

In avoiding the alleged errors in Phelps-Dodge's employment practices, Lentini felt constrained to engage in one hiring practice which does not commend itself to an employer who hires strictly on the basis of the objective qualifications. Lentini hired a number of unqualified individuals who were members of a religious movement favored by his employer, in order that those individuals might be given work experience which would rehabilitate them and help them out of their various personal difficulties. If they proved totally unsuitable, they were discharged. While this type of hiring practice is unconventional, its basis was not and is not a discrimination in hire or tenure designed to promote or discourage unionization. It has often been said that an employer may hire or fire for good reason, bad reason, or no reason at all, so long as the reason is not motivated by union considerations. The motivation for hiring individuals

recommended by Way members was not coldly economic. It was colored by candidly stated charitable and philanthropic considerations but these considerations do not detract from the Respondent's argument that its personnel actions have not been discriminatory, as the Act views that term.

Statements made by Lentini, one of the Goerlers, and others are certainly frank admissions that the Respondent wished to operate a non-union establishment. None of these remarks was alleged to be an independent violation of the Act. Rather, the General Counsel relies upon them as evidence of animus which might serve to explain other related actions which are specifically charged as violations of the law. For the most part, these remarks express nothing stronger than preference. If such preference is the equivalent of animus, then most if not all employers come into an unfair labor practice hearing tainted by animus from the outset. If the remarks in question constitute something stronger than preference, then further examination must be made to see how or whether this animus was applied in practice.

Some twenty-one of the Respondent's present complement of sixty employees are former Phelps-Dodge employees. Presumably they are persons whose union affiliations were known to their employer at the time of their employment. We do not know how many of the Phelps-Dodge group of eighty laid off employees actually applied for work at Savoy Faucet. We do know twenty-three of them did so on December 2 and presumably others did the same on other occasions. Hiring 21 out of 23-plus applicants is a solid indication that past union affiliations were not a factor in Savoy Faucet's hiring determinations. The 21 hired constitute one-third of the current work force, a fact which also suggests that union membership has not been a handicap to a significant number of present employees. This figure also denotes more than mere tokenism by the Respondent in the hiring of union members. The large number of former union members on the Respondent's present payroll belies the contention that the remarks about preferring to run a non-union shop amount to animus, since the actions of the Respondent speak louder than these words. Faced with these statistics the General Counsel is forced to a fall-back position, namely that Union membership was not the thing which bothered the Respondent so much active unionism in the form of picketing.

Three out of at least eleven pickets were offered jobs as well.

In light of factors in this record which point in opposite directions, whether or not a failure or refusal by the Respondent to hire one Phelps-Dodge (i.e., a Union) employee as distinguished from another amounted to an illegal discrimination, or whether the decisions were bona fide, actually must turn, in the last analysis, upon the reasons given for declining to employ each individual and the facts supporting those reasons. This discussion therefore must move from general considerations to particular evaluations and the evidence which bears out each of those reasons.

a. Rudy Creitoff has been an employee of Savoy Brass and Phelps-Dodge for some nineteen years. He worked at various jobs in the plant and was in the assembly section when the plant closed on July 22, 1977. He made an individual application for a job in September, 1977, at which time Lentini told him that he would call him if a job became available. When he was not hired, he began to picket. He was one of the 23 who filed applications with Union assistance on December 2.

Lentini states that he decided not to hire Creitoff because he was accident prone. Creitoff denies knowing of the terminology "accident prone" but admits that he had several accidents years ago in the machine section of the plant and had another accident in April, 1976, which limits the kind of work he is able to do. He states that can do assembly work and packing but admits that he cannot lift heavy packages. When Creitoff acknowledged that he has had a lot of accidents, he admitted the factual premise which supports Lentini's decision not to hire him. Accordingly, I cannot say that the reason asserted by Lentini was either false or pretextual, and so would dismiss the Complaint as to Creitoff.

b. Alfredo Hernandez began working at the factory in 1968 and has worked in the assembly and testing areas. Lentini made no adverse comments concerning the quality of his work. However, he stated flatly that, during the Phelps-Dodge regime, Hernandez acted as a numbers runner in the plant and testified further that he had first-hand knowledge of Hernandez' gambling activities. On this point I credit Lentini and I flatly discredit Hernandez' denial that he ever played or ran numbers

while working for Phelps-Dodge.

Lentini also said that he was aware that Hernanadez had been warned about his numbers activities by the Phelps-Dodge plant manager prior to the closing of the plant in July. Lentini testified that he knew that the present owners were strict religious people who would not be as tolerant and as easygoing about illegal gambling on the job as Phelps-Dodge had been. For that reason he decided that he would be running a risk if he permitted Hernandez to come back to the plant. The reason asserted respecting Hernandez was certainly valid and cogent, and it is a reason which I find to be factually supported. Accordingly, I would dismiss the Complaint as to Alfredo Hernandez.

c. Naomi Hernandez is the wife of Alfredo Hernandez. She worked in the assembly area and on testing machines for about eight years. Lentini stated that he did not want her to return to the plant for the same reason that he did not want her husband to return, namely is belief that the Goerlers would not tolerate the promotion of illegal gambling on the premises. Lentini admitted that he had no first-hand knowledge of Mrs. Hernandez' involvement in numbers running but felt that it was common knowledge in the Phelps-Dodge plant that she and her husband were actively involved in this activity. I discredit Mrs. Hernandez' denial that she was involved in numbers activities, a denial which extended to an assertion on her part that she did not even know that numbers betting took place in the Phelps-Dodge plant. Lentini was certainly at liberty to base a hiring decision upon well-founded hearsay, and I conclude that the reason he asserted for not hiring Mrs. Hernandez was his actual reason. Accordingly, I would dismiss the Complaint as to Naomi Hernandez.

d. In the somewhat larger Phelps-Dodge operation, both Dominic Gutowski and discriminatee Frank Feimer worked in the toolroom. The Respondent needed only toolmaker for its reduced activity and chose Gutowski over Feimer. Feimer claims that the choice was a discrimination based upon union considerations. In support of the Respondent's selection of Gutowski as toolmaker, Lentini testified that it was Ferrigno, the plant engineer, who preferred Gutowski because Feimer could not form tools, although Feimer did make dies and worked on jugs and fixtures. Feimer, who had worked at the plant for 19

years, testified that, in his opinion, he had performed better than Gutowski on several specified machines. Others disagreed. He did admit that, when making out an individual application to come to work for Savoy Faucet, he had specified that he wanted his old job back in the toolroom.

Gutowski was not hired until after the picketing ceased. When Ferrigno contacted him during the picketing to ask him to come to work, he replied that he had a job elsewhere and would not come to work for Savoy Faucet till the picket line went down. While Feimer gave evidence to the employee of union activity by picketing, Gutowski certainly demonstrated union sympathy and support by announcing to Ferrigno a refusal to cross the Union's picket line. In light of these facts, any discrimination based upon union activities between Gutowski and Feimer would require a measurement on their respective degrees of support for the Painters which is simply too fine to calibrate. The Board cannot second-guess the business judgment of an employer who hires one qualified individual instead of another individual for a single opening. It can only evaluate the situation to determine if the decision was in fact a business decision and not one prompted by union considerations. As both Feimer and Gutowski were capable of performing the work in question and as both had evidenced union sentiments and activities to the Respondent, it cannot be said that the choice of either one was designed to promote or discourage union membership or activities. Accordingly, I would dismiss the Complaint as to Feimer.

e. Gerardo Pinzon began working at the factory in 1968. He worked at a variety of jobs, including the toolcrib and the receiving department. During his last four years of his employment by Phelps-Dodge, he was the Painters' shop steward. Pinzon was also the Union's observer at the December 2 election. There is no evidence that his application for employment was limited to working at the toolcrib, a job which was abolished by the Respondent when it reorganized the production operation.

Lentini testified that Pinzon was not hired because the position he formerly occupied no longer existed, and also because he lost time due to allergies to dust and oils which caused him to break out when assigned to certain jobs in the plant. In fact, Pinzon

could perform a wide variety of jobs in the plant and signified his avilability for anyone of them when his application for employment was made on December 2. Pinzon did not in fact have any allergies which reacted adversely when placed in various jobs in the plant. He suffered from hives, a disability which was not job-related and which he was told by his doctor was the result of nervousness. Unlike some of the other cases herein, the refusal to hire Pinzon presents a decision involving factors of long-time and continued Union leadership, as evidenced from his position as shop steward and as Union observer in the record. Accordingly, I conclude that, by refusing to hire Gerardo Pinzon when a larger number of jobs which he could perform were in fact available, the Respondent was prompted by Union considerations and thereby violated Section 8(a)(1) and (3) of the Act.

f. Lentini testified that he decided not to hire Blanca Amaya because of her record of absenteeism at Phelps-Dodge. Mrs. Amaya worked about two years for Phelps-Dodge in the packing section. She felt that she had a good attendance record but admitted that she was off work about three weeks because of an operation. In addition to the mass application for work which all discriminatees made on December 2, she made another individual application. In January, 1978, she spoke personally with Lentini at the plant and gave him another application. She argued with him on this occasion, asking him why he had hired new people to do work which she had been doing for Phelps-Dodge. Lentini told her on this occasion that possibly he could call her for employment in two weeks but the call never came.

Like the other discriminatees named in the Complaint, Mrs. Amaya engaged in picketing the Respondent's premises in the late fall of 1977. Unlike some of the other discriminatees, there is no solid foundation for the Respondent's proffered excuse for not hiring her. A single absence of limited duration for an undisputed medical reason does not constitute absenteeism in any fair sense of the word. Absenteeism suggests a practice of repeated and irregular absences which impede production scheduling because of the uncertainty generated by an employee's unstable work habits. There is none of this in evidence respecting Mrs. Amaya. She was simply sick on one occasion and that is all the record herein reflects. Accordingly, I conclude that the reason

asserted for the Respondent's refusal to hire her in the face of her emphatic request for employment is without any factual foundation. Accordingly, I conclude that the reason which was proffered was pretextual and that, by refusing to hire Blanca Amaya, the Respondent violated Section 8(a)(1) and (3) of the Act.

g. Lentini also testified that he also declined to hire Doris Perez because of Mrs. Perez' record of absenteeism. Mrs. Perez worked for Phelps-Dodge for about two years in the assembly section. She suffers from asthma which is particularly acute in cold weather. She admits missing work from time to time, especially in the winter months, because of this disability, although she states that she always furnished a doctor's certificate to verify the fact that there were medical reasons for her absences. She also missed work from time to time to attend hearings of the New York Welfare Department involving a dispute over welfare payments.

Unlike the case of Mrs. Amaya, there is evidence from Mrs. Perez' own testimony that she repeatedly missed work while in the employ of Phelps-Dodge. Even though the excuses might be bona fide, the fact that she frequently did not appear on the job when expected constitutes a basis on which Lentini could legitimately say that she was guilty of absenteeism. Since his reason for refusing to hire Mrs. Perez is supported factually, I conclude that there has been no discrimination against Mrs. Perez based upon union considerations and that the Complaint should be dismissed as to her.

h. The Respondent offered employment to Carmen Garcia, John Luscavage, and Olga Vega. Luscavage and Mrs. Garcia are now working. Mrs. Vega declined the offer because she could not find a babysitter to care for her child. The General Counsel contends that a discrimination based upon Union considerations took place in respect to these employment offers because the Respondent was dilatory, and because the delays were prompted by Union Considerations.

By extending an offer of employment to each of these persons, the Respondent is necessarily saying that each of them is a suitable employee and that jobs were available at the time of the offer. The question remains whether jobs were also available

before the time of the offer. In determining whether or not the Respondent was footdragging in making offers employees who were active on the Union's picket line, the following employment picture (which includes persons hired and later terminated as well as those hired and still on the job) is relevant:

Month	**No. of persons hired by Respondent**
September, 1977	1
October, 1977	16
November, 1977	7
December, 1977	14
January, 1978	8
February, 1978	4
March, 1978	5
April, 1978	5

Mr. Luscavage was offered employment on or about March 20. Mrs. Garcia was offered employment on or about April 14. Mrs. Vega was offered employment sometime in May.

The Respondent offered as its reason for refusing to hire Phelps-Dodge employees *en masse* and for going to the general job market, in the face of applications from experienced persons which it had in hand after December 2, a desire to up-grade the quality of the work force in comparison with the Phelps-Dodge employee complement, to hire only what Lentini called the "cream of the crop." By all reports, Mrs. Garcia was the cream of the crop. She was a dynamic supervisor for Phelps-Dodge and was highly regarded. Lentini states he was reluctant to offer her immediate employment at a time when he was trying to fashion a work force for a group made up largely of unexperienced people because he was afraid she would not take a cut in pay from the supervisor's wage she had been earning in order to work at the rate that was being paid for the jobs which were then available. Ultimately, this is just what Mrs. Garcia did.

Despite her presence at the plant and her known availability for work, Lentini did not offer Mrs. Garcia the option she ultimately accepted until four months after she notified him of her desire to go to work. In the face of employee difficulties in

December and thereafter which arose because of inexperienced help and the employment of members of The Way who were, in many instances, admittedly unsuitable, this excuse in regard to Mrs. Garcia seems incredible. As it is unworthy of belief, and as no other plausible explanation was advanced to explain the delay in hiring an outstanding employee at a time when large numbers of marginal applicants were being placed on the payroll, I can only conclude that the Respondent was delaying her employment because of her activities on the picket line. Accordingly, I conclude, with respect to Mrs. Garcia, that the Respondent violated Section 8(a)(1) and (3) of the Act.

John Luscavage had worked at the plant since about 1942 and was able to perform a wide range of duties. Lentini's reason for delay in the hiring of Luscavage, while hiring many who lacked any experience or working ability, was that he apparently had type cast Luscavage as a man who could work only on castings and there were not enough castings available until he was offered a job in March. Lentini was well aware that Luscavage could and would perform a variety of other unskilled and semi-skilled jobs. There was nothing in his application for employment or in his other statements to the Respondent in which he limited his application to the kind of work he was doing when the plant closed in July. As the explanation for the delay in hiring Luscavage is not supported by the record, I can only conclude that Lentini held off hiring him because of his activity on the picket line in October and November. Accordingly, I conclude that the Respondent, in the case of John Luscavage, violated Section 8(a)(1) and (3) of the Act.

Between the time Olga Vega abandoned the picket line and notified the Respondent of her availability for work, and the time the Respondent offered her employment, at least thirty-six other persons, some of them without any prior experience, had been hired to fill the Respondent's expanding work force. No excuse whatsoever is proffered by the Respondent for the delay of more than five months in making her an offer. Accordingly, I can only conclude that the delay was promoted by Mrs. Vega's activities on the picket line and, as such, constitutes a violation of Section 8(a)(1) and (3) of the Act.

i. Lentini stated that he declined to offer a job to Ana Luscavage in March because he had no work available at that time which would be suitable for a person working under her asserted physical limitations. In March, when Lentini phoned to offer her husband a job, Mrs. Luscavage asked him about a job for herself and was informed that, when one became available that she could fill, she could have it. Lentini outlined on the record his belief that Mrs. Luscavage had arthritis in her hands which limited her to certain work in the assembly section such as wrapping handles or bagging nuts and bolts. He had no light work of that variety in March and no such position had opened up as of the time of the hearing.

Mrs. Luscavage admitted in her testimony that, with Phelps-Dodge, she had lost a considerable amount of time because of a back ailment. During cold weather, her back ached. When she complained about it, the Phelps-Dodge supervision transferred her to the assembly section because the area was not so cold. She also admitted having a slight problem with arthritis in her hands and corroborates Lentini's testimony to the extent that Lentini told her that at some future time he might be able to offer her a job in which she could sit down but that he had nothing available at the time. Mrs. Luscavage's own testimony confirms that Respondent's contention that she was able to perform only limited functions at the plant and was available only for a few types of jobs. There is no evidence to contradict Lentini's assertion that a job tailored to Mrs. Luscavage's physical limitations was not currently available. Accordingly, I conclude that there is record support for the Respondent's reason for not hiring Mrs. Luscavage and that, as to her, the Complaint should be dismissed.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

II. Conclusions of Law

1. Respondent Savoy Faucet Company, Inc., doing business as Savoy Brass Manufacturing Company, is an employer engaged in commerce within the meaning of Section 2(2), 2(6) and 2(7) of the Act.

2. Metal Production and Novelty Workers Union, Local 28-A, International Brotherhood of Painters and Allied Trades, AFL-CIO, is a labor organization within the meaning of the Act.

3. By refusing to hire Gerardo Pinzon and Blanca Amaya, and by delaying offers of employment to Carmen Garcia, John Luscavage, and Olga Vega, in order to discourage membership in and support of the Union, the Respondent herein violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices have a close, intimate, and substantial effect on interstate commerce, within the meaning of Section 2(6) and 2(7) of the Act.

III. Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Because the unlawful activity found herein involves discriminatory refusals to hire individuals, I will recommend to the Board a so-called broad 8(a)(1) of the Act. The recommended order will also provide that the Respondent be required to offer employment to Gerardo Pinzon and to Blanca Amaya, and to make financial restitution to these individuals and to Carmen Garcia, John Luscavage, and Olga Vega, in the amounts they would received but for the discrimination found herein, to be computed in accordance with the *Woolworth* formula[5] with interest thereon at the adjusted prime rate used by the U.S. Internal Revenue Service for tax payments. *Florida Steel Corporation*, 231 NLRB No. 117; *Isis Plumbing & Heating Co.*, 138 NLRB 716. Backpay should commence to run from December 2, 1977, when these individuals abandoned the picket line and requested employment. In the case of Mrs. Garcia, Mrs. Vega, and Luscavage, it should terminate on the dates they were offered employment. I will also recommend that the Respondent be required to post a notice, advising its employees of their rights and of the remedy in this case.

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[5] *F.W. Woolworth Company*, 90 NLRB 289.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:[6]

ORDER

Respondent Savoy Faucet Company, Inc., doing business as Savoy Brass Manufacturing Company, and its officers, agents, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Metal Production and Novelty Workers Union, Local 28—A, International Brotherhood of Painters and Allied Trades, AFL-CIO, or any other labor organization, by refusing to hire job applicants or by delaying offers of employment to job applicants, or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) By any means or in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Offer employment to Gerardo Pinzon and to Blanca Amaya.

(b) Make whole Gerardo Pinzon, Blanca Amaya, John Luscavage, Carmen Garcia, and Olga Vega for any loss of pay suffered by them by reason of the discrimination practiced against them, in the manner described above in the section entitled "Remedy."

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll and other

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[6]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

records necessary to analyze the amounts of pay due under the terms of this Order.

(d) Post at its Long Island City, New York, plant copies of the attached notice, marked "Appendix,"[7] in English and in Spanish. Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof, and shall be maintained by the Respondent for sixty consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

[7]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for the Twenty-Ninth Region, in writing, within twenty days from the date of receipt of this Order, what steps it has taken to comply herewith.

Insofar as the Complaint alleges violations of the Act which have not been found herein, the Complaint is hereby dismissed.

Dated, Washington, D.C. October 13, 1978

Walter H. Maloney, Jr.
Administrative Law Judge

APPENDIX

JD-716-78

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

SAVOY FAUCET COMPANY INC., is posting this notice to comply with the provisions of an order of the National Labor Relations Board. The Order was issued after a hearing before an Administrative Law Judge, after which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT refuse to employ job applicants and WE WILL NOT delay making offers of employment to job applicants because they have engaged in union activities. All of our employees are free to become or to remain members of METAL PRODUCTION AND NOVELTY WORKERS UNION, LOCAL 28-A, INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, or any other labor organization.

WE WILL NOT by any means or in any manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer jobs to GERARDO PINZON and to BLANCA AMAYA, and WE WILL make them and JOHN LUSCAVAGE, CARMEN GARCIA, and OLGA VEGA whole for any loss of pay they have suffered by reason of the discrimination practiced against them, with interest.

SAVOY FAUCET COMPANY, INC.,
d/b/a SAVOY BRASS
MANUFACTURING COMPANY

(Employer)

Dated:_____

By_____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street - 4th Floor, Brooklyn, New York 11241 (Telephone No. (212) 330-7709).

No. 80-96

FILED
AUG 28 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAVOY FAUCET COMPANY, INC., d/b/a SAVOY BRASS MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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v.

NATIONAL LABOR RELATIONS BAORD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discriminatorily denying or delaying employment to four applicants because of their union activity.

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Section 8(a)(3), 29 U.S.C. 158(a)(3) 1

OPINIONS BELOW

The order of the court of appeals (Pet. App. 8-9) is unreported. The decision and order of the Board (Pet. App. 10-36) is reported at 241 N.L.R.B. No. 7.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980. The petition for a writ of certiorari was filed on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 * * *
>
> (3) by discrimination in regard to hire * * * to discourage membership in any labor organization * * *

STATEMENT

1. In July 1977, Phelps-Dodge Corporation closed its plant in Long Island City, New York, which manufactured plumbing fixtures under the name of Savoy Brass (Pet. App. 16). When it was closed, the plant had about 80 employees represented by Local 28-A (*id.* at 15 n.2, 16).[1] In October 1977, the inventory and some of the equip-

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[1]Metal Production and Novelty Workers Union, Local 28-A, International Brotherhood of Painters and Allied Trades, AFL-CIO.

ment from that operation were purchased by Savoy Faucet, Inc. ("the Company"), which shortly thereafter began manufacturing plumbing fixtures (Pet. App. 17).

The Company hired some of the former Phelps-Dodge employees, but it refused to hire many others. On October 31 a number of the former Phelps-Dodge employees who had not been hired by the Company began to picket the plant on behalf of Local 28-A, which sought recognition as the representative of the Company's employees (Pet. App. 17-18). In a Board election held on December 2, the employees rejected Local 28-A's bid for recognition. On the day of the election, 23 former Phelps-Dodge employees who had not been hired by the Company and who had unsuccessfully sought to vote in the election went to the Company's office with Saul Lasher, Local 28-A's business representative. Lasher had obtained the signatures of each of these employees on separate forms which read: "I worked for Savoy Brass for—years as a—. I would like to work for Savoy [Faucet] immediately and I am available for work." These forms were presented to the company officials who were present. Clinton Goerler, one of the owners of the Company, told the employees that the Company had no openings at the time but would call them when jobs became available (Pet. App. 18; A. 194-195).[2]

Later, the Company did hire some of the applicants (Pet. App. 22). The Board found, however, that the Company had refused to hire one of the pickets and had delayed hiring three others because of their activities on the picket line. The Board examined the basis tendered by the Company for initially rejecting each of the 11 picketing employees for hire in December 1977, when

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[2]"A." references are to the printed appendix filed in the court of appeals.

other applicants were hired. The Board found that (1) the reason asserted for refusing to hire Blanca Amaya—i.e., excessive absences while employed by Phelps-Dodge—was false (Pet. App. 27-28), (2) the reasons offered for delaying offers to Carmen Garcia and John Luscavage were incredible[3] (Pet. App. 29-30), and, (3) no reason was tendered for delaying the offer to Olga Vega (Pet. App. 30). The Board ordered the Company, *inter alia,* to offer employment to Amaya, and to make whole Amaya, Garcia, Luscavage and Vega for any wages lost as a result of the discrimination against them (Pet. App. 12).

2. The court of appeals enforced the Board's order without comment (Pet. App. 8-9).

ARGUMENT

Petitioner does not contest the Board's finding, upheld by the court of appeals, that its refusal to hire Amaya and its delay in hiring Garcia, Luscavage and Vega were motivated by the picketing activities of those employees. Rather, petitioner's sole argument is that it was entitled to reject the employees' applications for employment because they were tendered by Local 28-A, a minority union. There is no merit in that contention.

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[3]A company official testified that Garcia was the "hardest working woman we have ever had" and did a "bangup job in quality control" (A. 129). He testified that he had failed to offer her a job earlier despite his difficulties in operating with inexperienced and, in some cases, admittedly unsuitable employees, because he was afraid she would refuse the lower paying production job that she accepted when offered (Pet. App. 29-30; A. 129). Luscavage had worked at the plant since 1942, and, as the Company was aware, had done a variety of skilled and unskilled jobs (A. 131-132, 190-191). The Company asserted that it had waited to hire Luscavage until the specific job he had done at the time of the shutdown—assembling raw castings—was available (A. 131-132, 158-160).

Petitioner did not refuse to consider the job applications that the discriminatees and other employees signed individually but submitted through Local 28-A's business representative. Rather, petitioner's managing owner, Clinton Goerler, accepted the applications, advised that petitioner would hire the applicants when jobs became available, and ultimately hired three of them. Moreover, petitioner never gave as a reason for not hiring any of the employees that their applications had been improperly submitted through Local 28-A. Contrary to petitioner (Pet. 6), nothing in the Board's decision suggests that an employer is required to deal with a minority union for any purpose or that petitioner was required to deal with Local 28-A.[4] Petitioner voluntarily accepted the individual applications tendered by the union agent and the Board's order does not require the Company to deal with Local 28-A in any manner.

Howard Johnson Co. v. *Hotel Employees*, 417 U.S. 249 (1974), (Pet. 5-6), provides no support to petitioner. There the Court held that, under the circumstances presented, a new employer could not be forced to arbitrate the extent of its obligations to its predecessor's former employees. This Court explicitly noted that, notwithstanding its holding, a new employer could not refuse to hire individuals based on "union membership or activity under § 8(a)(3) of the [NLRA]." 417 U.S. at 262 n.8. Nothing in the Board's decision or the court's order here suggests that

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[4] The General Counsel did not contend and the Board did not find that Savoy Faucet was a "successor" to Phelps-Dodge (Pet. App. 17). The Board specifically stated that the Company's only "duty in * * * regard [to hiring former Phelps-Dodge employees] is a negative one—to refrain from refusing to hire any former Phelps-Dodge employees, all of whom were unionized, because of their former union affiliations or their current union activities" (Pet. App. 22).

an employer is required to deal with a minority union for *any* purpose.

Macomb Block and Supply, Inc., 223 N.L.R.B. 1285 (1976), enforcement denied, 570 F. 2d 1304 (6th Cir. 1978) (Pet. 6) is distinguishable on its facts. The only application by the employees of the prior employer for employment with Macomb Block was made through the Teamsters, which sought through picketing to compel Macomb Block to hire the employees of the former owner at the rate paid under their old contract. Although the Board found that prior to the picketing Macomb Block had announced its intention not to hire any of the former owner's employees simply because they had been represented by the Teamsters (223 N.L.R.B. at 1286), the Sixth Circuit apparently accepted Macomb's argument that the employees conditioned their offer to work on Macomb's acceptance of the terms of the contract negotiated, but not signed, by the union and Macomb's predecessor, which would constitute tacit recognition of the Teamsters. In the instant case, however, the union's recognition claim had been rejected through Board processes, the picketing had ceased, and each of the former employees submitted an unconditional application for employment. Although the individual applications were submitted by a union official, there was no demand for either recognition of the union or adherence to the terms of any prior contract, and the company voluntarily accepted the applications without protest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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